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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1552

CARY L. HOOVER, ET AL,

Petitioners

versus

WYANDOTTE CHEMICALS CORPORATION,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. There is no conflict with the decisions of this Court.

The decision of the Court of Appeals does not conflict with *Steiner v. Mitchell*, 350 U.S. 247 (1956). *Steiner* held

that clothes change and clean up time is compensable under the Fair Labor Standards Act[1] where such activity is an "integral and indispensable part of the principal activities for which covered workmen are employed."[2] In *Steiner* there was no defense based on a custom or practice under a collective bargaining agreement, and the Court did not construe or apply Section 3(o) of the Fair Labor Standards Act. Respondent does not deny that the activity here in question is "principal activity" under the *Steiner* rule. Thus there is no *Steiner* issue in this case. Respondent's sole position for purposes of the present motion is that Section 3(o) applies. The Section 3(o) defense is not affected by *Steiner*. Indeed, Section 3(o) can only apply in cases where the time is otherwise compensable under *Steiner*, because where it is not compensable under *Steiner* there is no reason to reach the Section 3(o) issue. The Court in *Steiner* recognized that time spent in activities which are otherwise compensable "principal" activities under the Portal-to-Portal Act may be made noncompensable by Section 3(o):

> "In 1949, §3(o) was added to the Act. Both sides apparently take comfort from it, but the position of the Government is strengthened by it since its clear implication is that clothes changing and washing, which are otherwise a part of the principal activity, may be expressly excluded from coverage by agreement." [Emphasis added.] 350 U.S. at 254-255.

II. There is no conflict among the Circuits, and no important question of federal law is presented.

Section 3(o) was added to the Fair Labor Standards Act

1. 29 U.S.C.A. Sections 201 et seq.
2. 350 U.S. at 256.

in 1949. In its 23-year history Section 3(o) has been the subject of very little litigation and no judicial disagreement. The only other Court of Appeals decision we have found construing[3] Section 3(o) is another decision of the Fifth Circuit, which merely held that Section 3(o) was inapplicable where the employees were not represented by a labor union, since there could then be no custom or practice "under a bona fide collective bargaining agreement applicable to the particular employee." *Mitchell v. Southeastern Carbon Paper Co.*, 228 F.2d 934 (5th Cir. 1955).

Similarly, Section 3(o) has been the basis for decision in very few cases at the district court level. Two district courts have, in cases quite similar to the present one, applied Section 3(o) consistently with the decision of the Court of Appeals. *Williams v. W. R. Grace & Co.*, 247 F.Supp. 433 (E.D. Tenn. 1965); *Nardone v. General Motors, Inc.*, 207 F.Supp. 336 (D.N.J. 1962).

III. The decision of the Court of Appeals does not subvert the purposes of the Act.

Petitioners acknowledged that from 1964 until 1968 a custom or practice existed that would have barred the present action. Petitioners contend, however, that this custom or practice was terminated in the 1968 negotiations, in which the question of pay for clothes change and shower time was discussed. In those negotiations the union demanded 23 or 25

3. Section 3(o) was also cited, without forming the basis of the decision and without discussion, in *Blum v. Great Lakes Carbon Corp.*, 418 F.2d 283 (5th Cir. 1969), cert. denied 397 U.S. 1040 (1970) and *Dunning v. Q. O. Ordnance Corp.*, 228 F.2d 929 (8th Cir. 1955), re-affirmed 233 F.2d 902 (8th Cir. 1956), cert. denied 352 U.S. 927 (1956).

minutes' pay, the company offered 20 minutes', and the union rejected this offer.

These proposals and counter-proposals were made in the give-and-take of collective bargaining, and like many such proposals resulted in no change in existing practice. When the negotiations were concluded, the 15-minute practice emerged unchanged and continued to be applied after the execution of the 1968 labor contract in June, 1968 and remained unchallenged for more than a year thereafter until the present action was filed in September, 1969. The mere unsuccessful attempt to negotiate more pay did not change or terminate the practice; on the contrary, the fact that the matter was an active issue in the negotiations leading up to the bargaining agreement is proof that the practice involved was one "under" the bargaining agreement. *Williams v. W. R. Grace & Co.*, supra; *Nardone v. General Motors, Inc.*, supra. The statutory test is whether a custom or practice existed. Here such a custom or practice did exist for 5 years before this action was commenced, and the fact of its existence is not altered by an unsuccessful attempt to modify it 4 years after it was established. The statutory ratification of custom and practice would be rendered virtually meaningless if Petitioners can nullify the custom and practice after it is firmly established merely by objecting to it.

Petitioners further argue that rights under the Fair Labor Standards Act cannot be "waived" and that to permit Respondent to "interpose" its own "unilateral action" would be tantamount to finding a waiver on the part of Petitioners. With all due respect, Petitioners are merely quarreling with the Congressional judgment expressed in Section 3(o). It serves no purpose to characterize Section 3(o) as a waiver provision.

Congress giveth, and Congress taketh away. Whatever the general waiver rules may be, Congress has declared that where employees are represented by a union which has negotiated a labor contract for them, time spent in changing clothes and washing is noncompensable if it is excluded from working time **either** by the express terms of the labor contract **or** by **custom or practice** under it. Here the 15-minute rule was in fact the established custom and practice for 5 years prior to the institution of this action, and that is all Congress has required.

Finally, Petitioners argue that the holding of the Court of Appeals opens the door for an employer to adopt "ploys" to "thwart the intent" of the Act by "unilaterally" paying for less time than it knows is required. If that possibility exists at all, it is not as a result of the holding of the Court of Appeals but as a result of the statute, and it is anamolous to suggest that the statute defeats its own purpose. Rather, the Act must be read as a whole, and Section 3(o) is of equal dignity as an expression of Congressional intent in the area to which it applies as any other section.

Furthermore, employees are not, as Petitioners suggest, required to negotiate for rights granted them by the Act in order to avoid becoming bound by a practice. They are only required to act timely, and to take steps to overturn the system before it has been in existence long enough to obtain the status of a "custom or practice." Among the alternatives available to employees (or their union) objecting to a method of compensation for clothes change and wash up time, as long as they act timely, are the rights to 1) file a grievance under the grievance and arbitration procedure of the labor contract, 2) file a complaint with the Wage-Hour Division of the U. S.

Department of Labor, and 3) file a lawsuit of the type filed here. All the statute prohibits is the course of action pursued by Petitioners here—taking no steps to object to the system when it is first instituted, but waiting until it has become established and then suing for back pay.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Respondent's Brief have been served on Petitioners by depositing the same in the United States Mail, postpaid, addressed to Petitioners' attorney of record, Mr. Samuel I. Rosenberg, Polack, Rosenberg & Rittenberg, 1006 Hibernia Bank Building, New Orleans, Louisiana 70112, on this 23rd day of June, 1972.

William R. D'Armond